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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1988

GARY W. DIXON, Warden, Central Prison, and LACY H. THORNBURG, Attorney General of the State of North Carolina,

Petitioners,

v.

ROBERT HENRY MCDOWELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

WHETHER THE FOURTH CIRCUIT, IN OVERTURNING MCDOWELL'S NINE-YEAR OLD DEATH PENALTY CONVICTION WHICH PREVIOUSLY HAD BEEN AFFIRMED BY ALL STATE AND FEDERAL JUDGES WHO PROPERLY AND THOROUGHLY REVIEWED THE NONDISCLOSED EVIDENCE UNDER THE MATERIALITY TEST OF *UNITED STATES V. BAGLEY*, 473 U.S. 667 (1985), OVERLOOKED AND MISCHARACTERIZED MATERIAL FACTS IN ERRONEOUSLY CONCLUDING THAT THE NONDISCLOSED EVIDENCE COULD HAVE CREATED A REASONABLE DOUBT RESPECTING MCDOWELL'S GUILT.

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The Petitioners, Gary W. Dixon, Warden of Central Prison in Raleigh, North Carolina, by and through his undersigned counsel, the Honorable Lacy H. Thornburg, Attorney General of North Carolina, and Assistant Attorney General Barry S. McNeill [hereinafter "State"], respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit, filed on October 3, 1988.

OPINION BELOW

This petition seeks review of the published decision by the United States Court of Appeals for the Fourth Circuit, which is reported at *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988), and which is reproduced as Appendix 1-13.

JURISDICTION

The jurisdiction of this Court to review the Fourth Circuit's decision of October 3, 1988 is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

At issue in this case are the following provisions of the Fifth Amendment to the United States Constitution:

> [N]or shall any person...be deprived of life, liberty, or property, without due process of law;

and the Fourteenth Amendment to the Constitution, which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

On December 10, 1979, Robert Henry McDowell was convicted of the first-degree machete slashing murder of Carol Ann Hinson, age four, and the non-fatal slashing assault of 14-year-old Patsy Ann Mason. Pursuant to N.C.G.S. §15A-2000 (1978), McDowell was sentenced to death for the murder conviction, and for the felonious assault received a term of not less than 20 years nor more than 20 years to begin at the expiration of the remaining sentence for his 1970 second-degree murder conviction.

On November 4, 1980, in a unanimous decision, the North Carolina Supreme Court affirmed McDowell's convictions and sentences on appeal, including his sentence of death, finding no error in the trial or sentencing hearing. *State v. McDowell*, 301 N.C. 279, 271 S.E.2d 286 (1980).

On February 2, 1981, McDowell filed a Petition for Writ of Certiorari in this Court seeking discretionary review

of the decision on appeal by the North Carolina Supreme Court. The sole issue raised by the petition pertained to whether North Carolina's death penalty statute was unconstitutional because the jury was not required to list all of the mitigating factors which it had found. On March 23, 1981, the United States Supreme Court denied the petition. *McDowell v. North Carolina*, 450 U.S. 1025 (1981).

On April 16, 1981, McDowell filed a timely Petition for Rehearing claiming that he was denied due process because the North Carolina Supreme Court failed to review all of the mitigating circumstances found by the jury due to the trial court's failure to require the jury to specify the mitigating circumstances it had found when it concluded that the aggravating circumstances outweighed the mitigating circumstances. This Petition for Rehearing was denied by this Court on May 18, 1981. *McDowell v. North Carolina*, 451 U.S. 1012 (1981).

On May 27, 1981, McDowell initiated state post-conviction proceedings pursuant to N.C.G.S. §15A-1411 *et. seq.* (1978). An evidentiary hearing was held, and on December 5, 1981 McDowell was granted a new trial.

On January 10, 1984, the North Carolina Supreme Court vacated the order granting McDowell a new trial and remanded the case for a hearing *de novo*. *State v. McDowell*, 310 N.C. 61, 310 S.E.2d 301 (1984). The North Carolina Supreme Court held that the trial court had not applied the appropriate legal standard on the issue of whether McDowell was denied due process because of the State's failure to disclose evidence to the defense.

The hearing *de novo* was held on July 25, 1984. On December 14, 1984, the state trial court entered a comprehensive order making findings of fact and conclusions of law denying McDowell's Motions for Appropriate Relief.

On May 3, 1985, McDowell sought appellate review of the order denying post-conviction relief, but on August

13, 1985 the North Carolina Supreme Court denied the Petition for Writ of Certiorari.

On October 12, 1985, McDowell filed a Petition for Writ of Certiorari in the United States Supreme Court raising as his sole issue the State's death qualification of jurors. This Court denied the petition on June 2, 1986. *McDowell v. North Carolina*, 476 U.S. 1165 (1986).

McDowell filed a Petition for Rehearing on June 26, 1986, alleging as his grounds for rehearing that the death penalty was being applied arbitrarily in North Carolina, and that he had been unconstitutionally prohibited from cross-examining a State's witness. This Court denied the Petition for Rehearing on July 7, 1986. *McDowell v. North Carolina*, 478 U.S. 1028 (1986).

On October 29, 1986, McDowell filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of North Carolina-Raleigh Division. Following the State's answer to the petition and briefing by the parties, on August 7, 1987 United States District Judge James C. Fox rendered an 83-page Order and Judgment dismissing McDowell's habeas corpus petition.

Following briefing by the parties, McDowell's appeal was heard before a panel of the Fourth Circuit on April 7, 1988. The three-judge panel was composed of Chief Judge Harrison L. Winter, Senior Circuit Judge John D. Butzner, Jr., and Circuit Judge Sam J. Ervin, III. On June 20, 1988, the panel, in a 17-page opinion authored by Chief Judge Winter, reversed the district court's denial of habeas relief, holding that McDowell was denied due process of law by the State's nondisclosure of evidence.

On July 1, 1988, the State filed in the Fourth Circuit a Petition for Rehearing and Suggestion for Rehearing In *Banc* pursuant to FRAP 35 and 40, arguing that the panel had ignored or mischaracterized several instances of evidence upon which both the State courts and Judge Fox –

based their conclusions that the nondisclosed evidence was not material under *United States v. Bagley*, 473 U.S. 667 (1985). Following a reply by McDowell, on October 3, 1988 Chief Judge Winter entered an order (Appendix 13-14) indicating that upon a poll of the active Circuit Judges, five judges voted to grant rehearing in *banc*, while six judges voted to deny such rehearing in *banc*. However, because of factual errors in the panel's original opinion filed on June 20th, Judge Winter ordered that the former opinion be withdrawn and that a new corrected opinion (Appendix 1-13) filed that date be substituted in its place.

STATEMENT OF THE FACTS

I. Evidence at the State Court Trial

On July 14, 1979, at approximately 11:00 p.m., John Mason was watching television in his bedroom and dozed off to sleep. At the time, only John, his wife Sarah and the children (Patsy, Carol and James) were present in the house. John Mason awoke around 1:00 a.m. and the television was still playing. He then went to check on the children before going to bed. As he walked through the kitchen, Mason observed that the outside door to the girls' bedroom was open and he closed it. After shutting the door, he turned and saw Patsy sitting in the adjoining bathroom. Patsy's bloody face was "split all open" and there was blood all over the bathroom. After awakening his wife to summon the rescue squad, Mason then went into the girls' bedroom and found Carol lying at the foot of one of the beds. Carol was cut and also bloody. Mason picked Carol up and carried her outside where he met police officers as they arrived.

Carol was pronounced dead on arrival at the hospital. Patsy also was severely injured, but survived to testify at the McDowell's trial. According to Patsy, as she and Carol got ready for bed on that Saturday evening, she heard a knock at the outside door to their bedroom. Both girls went to answer the door, and opened it to find a black man standing at the door. Patsy described the black man as wear-

ing a dark pullover shirt and blue jeans, and indicated that his hair was "pleated down" and flat on his head. The black man had big eyes, a flat nose, and was carrying in his hand a machete, which Patsy identified as a long knife about two feet long. Patsy further testified that the black man called both her and Carol by name, but that she did not know his name at the time. The black man came inside the room, sat on the bed and asked if Patsy wanted to go riding on his bicycle to Cameron Village. After Patsy declined, the man started tickling Carol with one hand while holding the machete in his other hand. When Patsy asked the man where he obtained the machete, the man replied, "at Mitchell's," a discount store. The man asked if the girls' parents were asleep, and Patsy told him that they were. The man then warned the girls that if they made any noise or attempted to get up, he would cut them. The man repeatedly asked Carol to go to the bathroom and told Patsy that he wanted to rape her. As Carol was attempting to leave the room, the man grabbed Carol and threw her onto the bed. When Patsy picked Carol up and held her in her arms, the man began to strike at the children with the machete. Carol was cut on her head, her hand, and on her arm as she attempted to ward off the blows to her head. After Patsy was struck on her head by the man's machete, she did not regain consciousness until she awoke as a patient at the Duke Medical Center in Durham, North Carolina. While she was at Duke Medical Center, Patsy was treated for lacerations about her head, as well as to her wrist and several fingers. Specifically, Patsy had two lacerations to the top of her head which were "fairly deep down to the bone, approximately three to four inches each." She also had severe lacerations to her face, including a deep cut which began at her forehead and extended to the left of her nose, just missing her eye, down through her upper lip. She had a laceration over her right eyebrow, and slashes on her left cheek and the right side of her neck. Her left ear was partially severed from her head by a deep laceration.

Patsy identified Robert Henry McDowell as the man who attacked her and Carol with the machete. There was corroborating testimony that she had identified McDowell's

photograph in a photographic lineup shown to her while she was in the hospital.

Marvin Stone, Jr., testified that he was visiting at his parents' home on the night of July 14, 1979, next door to the Masons' residence, and that sometime after midnight he heard screaming coming from the Masons' residence. About five minutes later, he observed someone leave from the door leading into Patsy's and Carol's bedroom which faces Third Street. The person who was leaving got onto a bicycle and peddled north on Third Street. Although it was dark, the silhouette appeared to be that of a man. The chain on the bicycle rattled and sounded as if it was changing gears. The person peddled away very fast. Three or four minutes after the person left, Stone went over to the Masons' residence and looked through the storm door to see if anything was wrong. He saw a child on the floor and another girl with her back to him. At that time he could not tell if there was anything wrong and he returned home. Shortly thereafter he heard more screaming and he awakened his parents. The police arrived as Stone and his parents were walking over to the Masons' residence.

Frances Jenkins testified that McDowell had been living with her on July 14, 1979 for about nine months. On Saturday, July 14, 1979, Jenkins worked at a restaurant from 4:00 p.m. until midnight. When she left home for work that afternoon, McDowell was not at their residence. According to Jenkins, she called her residence at about 10:45 p.m. and McDowell was there. However, when she arrived home shortly after midnight, McDowell was not at the residence. Jenkins put her two children to bed, and at about 1:45 a.m. that morning she heard McDowell arrive home. Jenkins handed McDowell a pair of blue work pants out the front door and McDowell put them on. McDowell went around to the back porch and handed his machete knife through the screen door to Jenkins. Jenkins took the knife from the window and stuck it behind a chair in her bedroom. At trial, Jenkins recognized the machete as similar to the long knife which McDowell had passed through the window to her and which McDowell had pur-

chased at Mitchell's on Brass Street. McDowell remained lying on the back porch for approximately 30 minutes to an hour, and when Jenkins tried to get him to come into the house he refused. When she saw him lying on the back porch, he was wearing nothing other than the pants which she had given him. McDowell had a flashlight on the back porch and also had a pair of nunchukhs in his possession. Jenkins took the nunchukhs and put them on top of her refrigerator. She observed two or three scratches on McDowell's chest and below his ankle which appeared to have been bleeding. When McDowell finally came into the house he asked Jenkins to look out of the front door to see if she saw a car. McDowell then took a bath in the kitchen and went to bed when he finished. Although there were lights in the kitchen, McDowell never turned on any of the lights, instead using the flashlight on the back porch. According to Jenkins, McDowell got around town on a light green ten-speed bicycle, but she indicated the bicycle only had one speed. McDowell rode home on the bicycle that Sunday morning and left the bicycle on the front porch. Jenkins did not see what McDowell was wearing before she handed him the pants out the front door, but she did not ever see again the pullover shirt, cut-off blue jeans and sandals which he had been wearing on the afternoon of July 14, 1979 when she last saw him. McDowell's hair was "platted" close to his head that morning.

A search was conducted of Frances Jenkins' residence on July 21, 1979, and law enforcement officers seized, among other items, the machete knife, a flashlight, a set of nunchukhs, a visor, and a ten-speed bicycle. The machete knife, nunchukhs, flashlight, and visor were identified by Frances Jenkins as belonging to McDowell. Brenda Bissett, a forensic serologist with the North Carolina State Bureau of Investigation, examined the items seized in the search and found the presence of blood on the black visor cap, the machete knife, and the flash light. However, Bissett was unable to compare the samples with the blood of the victims because there was an insufficient quantity of blood on the machete, flashlight and visor to enable her to conduct a blood group analysis.

McDowell offered no evidence at the guilt phase of his trial.

II. State Evidentiary Hearings

A. Evidence for McDowell

Detective W. A. Baker of the Sanford Police Department testified that he interviewed Patsy Ann Mason at the Lee County Hospital on the early morning of July 15, 1979. He prepared an eleven-page report of his investigation, and read into the record from page four of his report the questions and answers which he wrote while interviewing Patsy:

Q: Do you know who did this?

A: Patsy motioned with her head in negative manner.

Q: Does he live in his neighborhood?

A: Motioned with her shoulder, "I don't know."

Q: Was he black or white?

A: White.

Q: How many were there?

A: (No response)

Detective Baker testified that this report was made available to the District Attorney, but to his knowledge the report was never provided to the attorneys for McDowell at any time prior to or during McDowell's trial.

When Detective Baker arrived at the hospital to question Patsy Mason she was in the emergency room and was receiving treatment for the wounds to her head, one of which was a severe and deep wound to the top of her head. None of her wounds had been closed at the time of the interview. Detective Baker described her condition as "semi-conscious," and testified, "I was unable to determine if she fully understood my questions." He noted in the police report that Patsy appeared semi-conscious and that he was uncertain as to whether she fully understood what was taking place at that point or the meaning of any of his questions. Patsy did not respond when asked about the number of assailants or to describe their approximate ages. Due to her condition, Detective Baker ceased his interview when Patsy became unresponsive. He was aware that Office Fred Garner was present at the time Patsy was brought to the emergency room, but he did not know whether Officer Garner obtained a description of the assailant from Patsy prior to his own interview with her.

During the course of the investigation, SBI Agent John Walker interviewed an eleven-year-old boy named Jerry Stone and recorded his statement. Stone related to Agent Walker that at approximately 11:30 p.m. on July 14, 1979, he had observed a black male, approximately 20 years of age, wearing no shirt and light green cut-off shorts, riding a bicycle north on Third Street in the vicinity of the Masons' residence. Stone told Agent Walker that the black male had a flashlight, that he rode up to the front porch of the Masons' residence and knocked on the front door, and that the front door was opened. Stone went over to examine the bicycle on the porch and described the bicycle as a white ten-speed. Stone then went to the side door and knocked. Patsy Mason came to the door and Stone talked with her. Stone looked into the room and also saw Carol Ann Hinson, but no one else. Patsy told Stone that she did not know who the black male was, and that the person might be talking to her mother or father. Stone reported that he then went home, and shortly thereafter heard a ten-speed bicycle traveling fast down Third Street. Stone did not tes-

tify at McDowell's trial, and was not called as a witness at the evidentiary hearing or the hearing *de novo*.

Hope Spivey and Sheila Jackson testified concerning two incidents which allegedly occurred at the Masons' residence prior to the crimes. In one of these incidents, Hope, who was twelve-years-old and in the seventh grade at the time of the evidentiary hearing, thought that she saw a white man upstairs in the Mason's house and so she and the other girls screamed. John Mason came upstairs, but saw no one and no one passed him on his way upstairs. The police were summoned but did not find evidence of an intruder. On another occasion, Sheila believed that she saw a man with a knife in the Masons' house, but at the evidentiary hearing she testified that she had imagined this incident. Officer W. F. Thomas of the Sanford Police Department talked with Hope Spivey and Sheila Jackson about these incidents after Carol's death, but he could find no evidence that any intruder had been in the Masons' residence. Both incidents were determined by the police to be "unfounded." Terry Hinson, the mother of Carol, also reported one of these incidents to the investigating officers, who made notes of their interview with her, but this information was not provided to defense counsel at any time before or during McDowell's trial. Although Terry Hinson was under subpoena by both the State and McDowell at the evidentiary hearing, she was not called as a witness at the hearing or at the hearing *de novo*.

Attorney Jeff Ward testified that he, along with J. W. Hoyle, represented McDowell at his trial in December of 1979. Ward had information that McDowell was acquainted with Patsy Mason prior to the crimes. McDowell himself advised Ward that he knew Patsy and had seen her on one occasion at Ivan Dark's place.

Ward recalled that during the course of the trial Patsy answered in the affirmative when she was asked by the District Attorney whether she had ever seen McDowell prior to the night of the assault. Ward also recollected that on cross-examination attorney Hoyle asked Patsy where she

had seen McDowell previously, and Patsy testified that she had seen him at a local prison facility. Neither Hoyle nor Ward attempted to elicit any further information from Patsy regarding her prior acquaintance with McDowell, or whether she had seen him at any other locations.

B. Evidence for the State

The State called as its first witness at the evidentiary hearing William Norris Farrell, Jr., formerly an Assistant District Attorney who participated in the prosecution of the case against McDowell. In preparation for the trial, Assistant District Attorney Farrell had contacts with the defense attorneys in reference to discovery and other matters in the case. The defense attorneys filed a standard discovery motion, to which Farrell complied with the specific requests for discovery. He provided the defense attorneys with the autopsy report, four SBI laboratory reports which dealt with blood samples, fingerprint reports, and items of evidence seized from the residence of Frances Jenkins. Farrell also accompanied Ward to interview Frances Jenkins and to inspect her residence. He provided the defense attorneys with information relating to McDowell's previous criminal history, as well as other information concerning previous psychological evaluations of McDowell. He accompanied attorney Hoyle to Duke Medical Center to interview the attending physicians who treated Patsy. He also arranged for Hoyle to interview the medical examiner about the autopsy upon Carol. Neither of the defense attorneys made any requests prior to trial or at trial for any descriptions that Patsy Mason had given of her assailant. Furthermore, the attorneys made no specific request for information concerning the previous alleged intruders into the Masons' residence.

Farrell testified that he had fully examined all of the SBI reports, police reports and documents, and the witnesses' statements prior to trial, and that he did not con-

sider any of the information contained therein to be exculpatory of McDowell.

Dr. Harry Steiner, the attending physician at the emergency room who treated Patsy Mason for her injuries, testified that Patsy appeared conscious at the time of his examination of her, but was non-communicative. She would not respond to questions asked by Dr. Steiner as to what had happened to her or whether she was in pain. According to Dr. Steiner, Patsy possibly could have been in mental or emotional shock at that time. In Dr. Steiner's opinion, Patsy's loss of consciousness was consistent with the injuries she had suffered. He further testified that a concussion and loss of consciousness could have affected her memory for some period of time. He administered medication to Patsy during her emergency room treatment prior to having her transported to the Duke Medical Center for further attention. He also testified that considering the injuries Patsy suffered, it was likely that such a person would experience a disorientation or mental blocking of recent events.

Officer Fred Garner of the Sanford Police Department testified that he also questioned Patsy Mason upon her arrival at the Lee County Hospital.Patsy provided him with her name, address and age and also told Officer Garner that she did not know who had assaulted her. However, when he asked her whether or not the person that assaulted her was black or white, Patsy indicated that her assailant was black. Officer Garner did not record this interview with Patsy because he was at the hospital simply to take initial information from the victim.

C. Evidence at the Hearing De Novo

The only additional witness called by McDowell to testify at the hearing *de novo* was Dr. Albert Barnes Ehle, an Associate Professor of Neurology at the University of North Carolina School of Medicine. Having examined Patsy's

medical records and Dr. Steiner's testimony at the previous evidentiary hearing, it was the opinion of Dr. Ehle that Patsy's physical injuries were not such as to have affected her ability to describe her assailant nor to produce retrograde amnesia. However, on cross-examination Dr. Ehle admitted that it was possible the events surrounding Patsy's injuries and the death of Carol could have produced psychological trauma affecting her ability to answer questions.

REASONS WHY THE WRIT SHOULD ISSUE

The Fourth Circuit overlooked and mischaracterized material facts in erroneously concluding under *United States v. Bagley, supra*, that the nondisclosed evidence could have created a reasonable doubt of McDowell's guilt for the first-degree machete slashing murder of a four-year old child, and the brutal assault upon her surviving 14-year-old aunt.

Capital cases, by their very nature, generally are factually complex and voluminous. Indicative of this complexity is the fact that United States District Court Judge James C. Fox rendered an exhaustive 83-page Order dismissing McDowell's habeas corpus petition, and wrote an additional 19-page Order denying McDowell's motion to alter or amend the judgment. In what can only be described as cursory treatment of the facts of the instant case, the Fourth Circuit panel hardly alluded to Judge Fox's extensive analysis of the case and, in the several instances discussed below, completely ignored or mischaracterized the evidence upon which both the State courts and Judge Fox based their conclusions that the nondisclosed evidence was not material under *United States v. Bagley, supra*.

As Judge Fox properly recognized, "a full understanding and appreciation of the evidence is crucial to this Court's review of McDowell's federal habeas corpus claims." In fact, over 32 pages of Judge Fox's Order was devoted to an exhaustive summary of the facts, both from McDowell's trial and state post-conviction hearing. Despite the fact that the State courts' and District Court's ruling on the materiality of the nondisclosed evidence is a mixed question of law and fact which should be reviewed *de novo, see, e.g., Bowen v. Maynard*, 799 F.2d 593, 610 (10th Cir. 1986), *cert. denied*, ___U.S. ___ , 93 L.Ed.2d 404, 107 S.Ct. 458 (1986), one would expect that the panel carefully would have reviewed the evidence as summarized by the District Court, particularly since this is such an important state criminal matter. However, a comparison of the decisions reveals a surprising and disturbing lack of attention by the panel to the true facts, which inattentiveness cannot be allowed to remain unchallenged. Therefore, as a matter of fairness and in the interests of justice, this case warrants review by writ of certiorari.

I.

Perhaps the most glaring oversight by the panel is its complete lack of respect for what Judge Fox recognized as the "absolutely damning testimony of [McDowell's] girlfriend, Frances Jenkins." Chief Judge Winter characterized Frances Jenkins' testimony as merely circumstantial evidence that McDowell "had behaved suspiciously." (App 2) However, a juror hearing such evidence would have perceived it much differently, as did all the other state and federal judges who previously had reviewed the case. Moreover, Jenkins' highly incriminating testimony effectively distinguishes this case from *Norris v. Slayton*, 540 F.2d 1241, 1244 (4th Cir. 1976), on which the panel heavily relied.

Jenkins testified that McDowell arrived home at about 1:45 a.m. on the night of July 14th, within a short period of time after the murder was alleged to have occurred. McDowell requested a pair of pants, and stayed on the back porch lying down for approximately one hour, not

turning on any lights. McDowell handed his machete through the screen door to Jenkins, and at trial Patsy identified this machete as the one McDowell used to brutally slash her and murder Carol. McDowell had a flashlight and also a pair of nunchukhs in his possession. Patsy also identified these same nunchukhs as the ones she saw in the back pocket of her assailant on the night of the crimes. Although there were lights in the kitchen, McDowell never turned on any of these lights, and used his flashlight while he was on the back porch. When McDowell finally entered the house, he had Jenkins look out the front door to see if she saw a car. McDowell then took a bath in the kitchen before retiring to bed. McDowell had arrived home on his light green, ten-speed bicycle that morning, and left the bicycle on the front porch.

Although there was no direct physical evidence linking McDowell to the crimes, it should be noted that the State did present evidence showing that blood was found on McDowell's visor, the machete, and his flashlight. However, there was an insufficient quantity of blood on the items to enable the forensic serologist to conduct a blood group analysis.

Through Jenkins' testimony, the State presented an extremely strong, if not overwhelming case against McDowell. As Judge Fox emphasized, Jenkins' description of McDowell, as he appeared shortly after the murder and assault, was consistent with Patsy's description of the assailant, including his hair, pullover shirt, and blue jeans. Moreover, the similarity of McDowell's machete and nunchukhs to the weapons in the possession of the assailant, and the corresponding evidence of McDowell's flashlight and bicycle also significantly bolstered the State's case. Therefore, notwithstanding the importance of Patsy's identification of McDowell, it is unlikely the evidence concerning her prior contradictory "white" description, even if it had been known to the jury, would have significantly impeached her testimony such as to create a reasonable doubt as to McDowell's guilt. The fundamentally different views of Judge Fox and the panel on the importance and impact of

Jenkins' testimony are too diverse to be ignored, and should be resolved by this Court.

II.

The panel also mischaracterizes and takes out of context the nondisclosed evidence, in particular the evidence relating to Patsy's alleged contradictory description of her assailant as being white. In its opinion, the panel merely quotes an excerpt from the interview at the hospital emergency room during which it was recorded that Patsy indicated her and Carol's assailant was white. Taken out of context, this contradictory description admittedly raises questions about Patsy's identification of McDowell. However, when properly viewed in light of all the evidence, including the State court's findings of fact which are binding upon this Court pursuant to 28 U.S.C. § 2254(b), it is more easily understandable why both the State courts and the Judge Fox found the nondisclosure of this alleged description to be legally immaterial under *United States v. Bagley, supra.*

The Fourth Circuit failed to acknowledge and take into consideration that when Detective Baker arrived at the hospital to question Patsy she was in the emergency room receiving treatment for the wounds to her head, and that the wounds were "fairly deep down to the bone, approximately three to four inches each." Even one of McDowell's attorneys candidly admitted at the post-conviction hearing that he had never seen anyone survive a more serious injury than that suffered by Patsy. Her skull was fractured in two places. None of Patsy's wounds had been closed at the time of the interview.

Detective Baker contemporaneously noted in the police report that Patsy appeared semi-conscious and that he was uncertain as to whether she fully understood what was taking place at that point or the meaning of any of his questions. The attending physician at the emergency room confirmed that Patsy was non-communicative in that she would not respond to questions asked of her as to what had happened or whether she was in pain, and that her loss of con-

sciousness, if any, was consistent with her injuries, in particular the depressed skull fractures.

The State courts expressly relied on the finding of fact that Patsy's ability to answer questions at the emergency room could have been affected by the psychological trauma of the events. Even McDowell's own witness, Dr. Ehle, admitted that Patsy may have been suffering mental and emotional shock at the time.

Therefore, it is unfair to suggest, as the Fourth Circuit did, that Patsy positively and coherently identified her assailant as white. In fact, Patsy testified that after she was struck on her head with the machete, she next remembered waking up as a patient at the Duke Medical Center several days later. Her condition rendered the response at the emergency room highly unreliable and speculative, which brings this case within the ambit of *United States v. Breit*, 767 F.2d 1084, 1092 (4th Cir. 1985) (witness' vague and vacillating recollections, which were not disclosed, could not have been used to impeach the prosecuting witness), a case the panel did not address or attempt to distinguish. *See Giles v. Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring in remand) (State does not have obligation to communicate preliminary, challenged, or speculative information).

Moreover, Chief Judge Winter was incorrect in suggesting that Patsy consistently was describing her assailant as a white man during the first few days after the attack. On the contrary, the panel ignored evidence showing that upon her arrival at the emergency room Patsy had indicated to another police officer that her assailant was black, thus contradicting her response to Detective Baker and demonstrating the disoriented state of her mental condition at the time. Other than the response at the emergency room, there is absolutely no evidence in the record that Patsy ever again gave the contradictory white description, even to her family.

III.

Chief Judge Winter also failed to properly analyze the second item of nondisclosed evidence relating to Jerry

Stone's account. The decision does not take into consideration that much of the evidence from Jerry Stone, in fact, would have been severely damaging to McDowell's defense. First, a comparison of McDowell's 10-speed bicycle with the description of the bicycle given by Stone tends to corroborate the case against McDowell. The bicycle found on Frances Jenkins' front porch, which was shown to have belonged to McDowell, was a light-green, or at least light-colored, approximately 26-inch 10-speed bicycle, with a black seat and racing-style handle bars turned up. Stone described the black male's 10-speed bicycle he observed outside the Masons' residence at approximately 11:30 p.m. as "white in color, 26-inch size...believed to be a Huffy brand,...no fenders, no horn and no front headlight." Stone also reported that the bicycle had an old black seat and that the racing-style handle bars were turned up (180°). Stone further noticed that the black male had a flashlight. Therefore, Stone's observations of the bicycle with the turned-up handle bars, the black male's possession of a flashlight, and the fact that he saw the black male at the Masons' residence near the time of the murder/assault all tend to implicate McDowell. Certainly, nothing in Stone's account tends to exonerate McDowell; the black male he observed simply was unidentified.

In addition, contrary to the statement in the panel's opinion indicating that Stone saw the black bicyclist being admitted into the Masons' residence, (App 5, 11), Stone did not see if anyone admitted the black male, or even if the black male ever entered the residence. Therefore, the suggestion that John Mason may have admitted a black male is unfounded and baseless speculation, which the panel should not have considered in its analysis.

IV.

Unfortunately, another example of such unfounded mischaracterizations of the true facts is found in the panel's summary and analysis of the third item of nondisclosed evidence, dealing with the reports of white intruders in the Masons' home. Although Chief Judge Winter represents that the second incident dealing with the white intruders oc-

curred only a "few hours" before the murder/assault on July 14, 1979, (App 6, 12), the state post-conviction court found as a fact that this second incident allegedly occurred "shortly before July 14, 1979," not on July 14th, and this finding should have been binding upon the Fourth Circuit. Hope Spivey testified that the second incident possibly occurred "maybe a couple of months" before the brutal assault upon Patsy and murder of Carol. Major C. B. Cummings of the Sanford Police Department testified that he interviewed Hope and Sheila Jackson shortly after the crimes occurred on July 14th, and they told him that this basement stairwell incident happened "a day or so before" the crimes. Even the account given by Terry Hinson indicated that this second incident took place "a few Saturdays ago," before Hinson's interview with Agent Stewart on July 17th, two days after the crimes. Contrary to the facts summarized by Chief Judge Winter, (App 6), the police were summoned as to the first white male intruder incident, but not as to the second incident. Therefore, there was absolutely no evidence of a white male intruder in the Masons' home only "a few hours before the crime."

CONCLUSION

The District Court, indeed all other courts who have reviewed this case under the proper materiality test of *United States v. Bagley, supra*, concluded after fairly reviewing all the evidence that the nondisclosures in question were not material. A reading of the opinion by Chief Judge Winter, which reaches the opposite result, indicates that the Fourth Circuit panel did not give the same careful consideration and review of the evidence as did the District Court. As noted above, there are many instances of mischaracterizations of the facts which were important to the panel's analysis of the materiality of the nondisclosed evidence. Many facts also simply were overlooked or ignored by the panel, which may account for the close vote by the Circuit Judges (six to five) denying the State's suggestion for rehearing in *banc*. Given that this is a capital case which is now almost nine-years-old, it is undeniably essential to the interests of justice that this Court give fair and thorough

consideration to the true facts of the instant case, especially if the public in general is to have confidence in our judicial system. Consequently, the State respectfully prays that a writ of certiorari issue to review the decision of the Fourth Circuit overturning McDowell's convictions.

Respectfully submitted,

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No. 88-_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1988

GARY W. DIXON, Warden, Central Prison, and
LACY H. THORNBURG, Attorney General
of the State of North Carolina,

Petitioners,

v.

ROBERT HENRY MCDOWELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-4006

ROBERT HENRY McDOWELL

Petitioner - Appellant

versus

GARY W. DIXON, Warden,
Central Prison, Raleigh, North Carolina

Respondent - Appellee

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, District Judge. (CA-86-1145-HC)

Argued: April 7, 1988 Decided: October 3, 1988

Before WINTER, Chief Judge, ERVIN, Circuit Judge, and BUTZNER, Senior Circuit Judge.

James Elliot Ferguson, II (Richard A. Rosen, Julius L. Chambers, Richard H. Burr, III on brief) for Appellant. Barry Steven McNeill, Assistant Attorney General (Lacy H. Thornburg, Attorney General; Richard N. League, Special Deputy Attorney General on brief) for Appellee.

WINTER, Chief Judge:

Robert Henry McDowell was convicted of first degree murder and felonious assault in the Superior Court of Johnston County, North Carolina on December 10, 1979. He was sentenced to death for the murder conviction and to a term of twenty years for the assault conviction. State v. McDowell, 301 N.C. 279, 271 S.E.2d 286 (1980), *cert. denied*, 450 U.S. 1025 (1981). McDowell pursued state postconviction remedies, and, after an evidentiary hearing, the trial court granted him a new trial. The Supreme Court of North Carolina vacated the trial court's order, State v. McDowell, 310 N.C. 61, 310 S.E.2d 301 (1984), and on remand the trial court denied any further relief. The Supreme Court of North Carolina declined to review the denial of relief, and a petition for a writ of certiorari was denied by the Supreme Court of the United States. McDowell v. North Carolina, 476 U.S. 1165, 90 L.Ed.2d (1986). McDowell then filed a petition for writ of habeas corpus in the district court, which was denied. The court also denied a motion to alter or amend its judgment of denial.

McDowell appeals, and we reverse. We conclude that the nondisclosure of exculpatory evidence by the prosecutor denied McDowell due process of law. We direct that the writ issue unless McDowell is tried anew in a reasonable period to be allowed by the district court.

I.

During the night of July 14, 1979, someone entered the bedroom of fourteen-year-old Patsy Mason and four-year-old Carol Ann Hinson at their residence in Sanford, North Carolina and assaulted them with a large knife. Patsy suffered serious injuries, but survived. Carol Ann was killed. The only direct evidence linking McDowell to the crime was Patsy's testimony identifying him as the assailant. Circumstantial evidence against McDowell consisted of the testimony of his girlfriend, Frances Jenkins, that McDowell had arrived at their home at 1:45 a.m., later than usual, and had behaved suspiciously. Police conducted a search of McDowell's dwelling and seized a machete knife, an instrument capable of having inflicted the type of wounds suffered by Patsy and Carol Ann, as well as nunchukhs and a flash-

light, items which according to Patsy her assailant had possessed. The prosecution could adduce no evidence of fingerprints, blood, hair, body secretions or other physical evidence linking McDowell to the crime. There was also no evidence of any inculpatory statements made by McDowell.

In addition to the identification testimony of Patsy, the prosecution presented the testimony of Marvin Stone, who, shortly after midnight, had "caught glimpses of a silhouette of a person on a bicycle" leaving the Mason home and pedaling down the street. About five minutes later he heard some screaming, and he investigated. Stone peered into a glass storm door into one of the Masons' bedrooms, and saw a small girl and a child lying on the floor. He returned home because there did not appear to be anything amiss. Several minutes later he heard more screaming. He awakened his parents and was returning to the Masons' when the police arrived.

Also present in the Mason house on the evening of July 14, 1979 were Patsy's parents, John and Sarah Mason, and her baby brother, Jerome. John Mason testified that he fell asleep watching television at 11:00 p.m. and awoke at 1:00 a.m. He made no claim that he awakened because of the screams. After waking, Mr. Mason checked on the children as he usually did before he went to bed for the evening, and upon discovering that they had been injured, he called for an ambulance. He then awakened his wife, who was still sleeping.

II.

McDowell contends that he was denied a fair trial, and hence due process of law, because the prosecution had in its file exculpatory evidence not disclosed to the defendant's counsel, despite a general request therefor, and that this evidence was not otherwise brought out at trial. He thus claims that the prosecution has violated the principles of Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, by failing to disclose evidence material to guilt or punishment. He also argues that the prosecution violated the principle first enunciated in Mooney v. Holohan, 294 U.S. 103 (1935)

that knowing use of false testimony is inconsistent with due process, because, in his trial, it permitted its witnesses to give a false impression of what transpired when it possessed evidence to indicate that falsity. Finally, McDowell argues that we should stay decision pending resolution of Franklin v. Lynaugh, *cert. granted* No. 87-5546 (October 9, 1987), which presents the question whether jury instructions pursuant to Tex. Crim. Proc. Code Ann. § 37.071(b), the sentencing provision for capital crimes, violate the Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978). McDowell claims that the instructions given by the trial court in the sentencing phase of his trial were identical to those given in *Franklin*. Franklin v. Lynaugh was decided June 22, 1988, ___ U.S ___. Because we think that McDowell's first argument is meritorious and adoption of it adequately disposes of the case, we do not consider his other contentions. Nor do we think it necessary to consider the effect of *Franklin* on this case.

There were three separate items of undisclosed evidence. First, there existed direct evidence potentially damaging to the reliability of Patsy's identification of McDowell as her attacker and Patsy's credibility or memory. Patsy was initially questioned about the identity of her attacker in the early morning hours of July 15, 1979, less than three hours after the attack, by Sanford police officer W. A. Baker in the Lee County Hospital. The following exchange occurred:

> Q. Do you know who did this to you?
>
> A. Patsy motioned with her head in a negative manner.
>
> Q. Does he live in your neighborhood?
>
> A. Motioned with her shoulder, I don't know.
>
> Q. Was he black or white?
>
> A. *White*. (emphasis added)

An interview conducted by SBI agent Stewart with Terry Hinson, (Carol Ann's mother and Patsy's stepsister), disclosed that she "knew that Patsy had already told that the people who did it were white." Patsy's description to SBI officer Scheppf on July 17, 1979, was that she was uncertain as to whether the man was black or white. Subsequently, on July 18, 1979, Patsy stated that her attacker had been black, with a medium afro and a medium build, and that she did not know the man. Patsy later identified McDowell from a photo spread. Defense counsel were apprised only of Patsy's July 18 description that her assailant was black, and of the results of the photo spread. At trial Patsy testified that she had always described her attacker as a black man with flat hair, big eyes and a flat nose, and that she had seen McDowell before briefly on only one occasion.

The second item of undisclosed evidence came from an interview between Agent John Walker and an eleven-year-old neighbor of the Masons, Jerry Stone. Stone reported seeing a black male approach the Mason home riding a bicycle "white in color," at about 11:30 p.m. on July 14. According to Stone, the bicyclist was "approximately 6'0", 20 years old, very skinny, very dark skinned, no hat, no shirt, light green medium cutoff shorts and believed to be wearing shoes, possibly black boots up to one foot high." The bicyclist shone a flashlight at the Mason residence, approached the front door, and was admitted into the house. Stone then examined the ten-speed bicycle, which he described as "a Huffy brand . . . white in color, . . . no fenders, no horn and no front headlight." Stone then knocked on Patsy's side door, and when she opened the door, asked her "who the colored boy was on the white ten speed bicycle." Patsy replied that she did not know, and that he might be talking with her parents. Jerry Stone then left and went home. Several minutes later, he heard "a ten speed bicycle travelling real fast down Third Street."

The final item of undisclosed evidence consisted of police reports prior to July 14 of white intruders in the Mason home. Hope Spivey and Sheila Jackson, young cousins of Patsy, told of two separate incidents, one several

weeks prior to the crime, and one just a few hours before the crime. A police report revealed that on June 25, according to Hope, Hope, Patsy and Sheila had been in an upstairs bedroom when they were distracted by a noise outside their room. They turned toward the bedroom door and suddenly saw a man, whose face was covered by a mask or was "red", peering in their bedroom door. The girls screamed and the intruder left. John Mason summoned the police, who came and made a written report of the incident.

The second incident occurred on July 14, when Patsy's cousins observed a "white/male" intruder near the Masons' basement stairway, wielding a knife. Again, the police were summoned and, despite the girls' vivid recollection of the intruder, the police dismissed the girls' accounts after an investigation of the basement turned up no evidence to support the story.

III.

The law to be applied when the prosecution fails to disclose exculpatory evidence to a defendant is relatively uncomplicated. Brady v. Maryland, 373 U.S. 83 (1963), held, as an extension of Mooney v. Holohan, 294 U.S. 103 (1935), that

> The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Id. at 87. The Court explained the rationale of the rule as "not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. . . .A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty . . . casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . ," even though the prosecutor's failure to divulge was not intentionally deceptive. *Id.* at 87-88.

The *Brady* doctrine was restated and amplified in United States v. Agurs, 427 U.S. 97 (1976). It acknowledges that *Brady* applies in four different situations: first, where the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony. In those instances the conviction is "fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* at 103 (footnotes omitted). The *Brady* doctrine also applies when there has been suppression of specific evidence described in a pretrial request. In that event, the Court held, the conviction or the punishment, as the case may be, cannot stand if the suppressed evidence is material. *Brady* also applies in two other instances where the defense makes no pretrial request for exculpatory evidence or where, lacking specific knowledge of what to request, the defense makes only a general request for exculpatory material.

In none of the three latter cases does the defendant need to demonstrate that the suppressed evidence would have resulted in acquittal. This very strict standard would not sufficiently encourage the "prosecutor's obligation to serve the cause of justice." *Id.* at 111. The Court has framed the issue instead by holding that

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed[.]

Id. at 112 (footnote eliminated).

United States v. Bagley, 473 U.S. 667 (1985), considered the standard of materiality to be applied in determining whether a conviction should be reversed because the prosecution failed to disclose requested evidence that could have been used to impeach prosecution witnesses. The Court rejected any distinction between impeachment evidence and

exculpatory evidence, and upheld its prior ruling in Giglio v. United States, 405 U.S. 150, 154 (1972), that "'nondisclosure of evidence affecting credibility falls within th[e] general rule [of Brady].'" 473 U.S. at 677. Elaborating on *Agurs* the Court concluded that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." The Court stated that this standard is identical to that adopted in Strickland v. Washington, 466 U.S. 668 (1984), to determine the propriety of granting a new trial due to incompetence of counsel. A court's inquiry in determining the materiality of the undisclosed evidence, as in *Strickland* should "consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case." *Bagley* at 683. The Court also held that this standard is applicable to "no request", "general request", and "specific request" cases of prosecutorial nondisclosure. *Id.* at 682.

As we have already mentioned, the standard of materiality on appeal is not altered because of the lack of misconduct on the part of the prosecution. *Agurs* directly addressed this issue, and determined that "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." 427 U.S. at 110. It follows that insignificant evidence deliberately withheld by a vindictive prosecutor who believes it to be important will not give rise to constitutional error, but if "evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it." *Id.* (Emphasis added). It is therefore no argument that, in this or any other criminal case, the prosecution did not recognize the importance of the undisclosed evidence, or would not have withheld the evidence had it been requested. "The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." 427 U.S. at

675. It is the fairness of the trial, not of the prosecutor's conduct which is at issue.

Agurs has clearly indicated that not all evidence favorable to the defendant will create a reasonable doubt. *Agurs* itself rejected the claim of the defendant that evidence of the homicide victim's prior record of weapons violations created a reasonable doubt where none before had existed. The Court noted that the prior record "did not contradict any evidence offered by the prosecutor, and was largely cumulative . . . ." 427 U.S. at 113-14.

By contrast, in Norris v. Slayton, 540 F.2d 1241 (4[th] Cir. 1976), we considered a set of circumstances very similar to those at issue here. In *Norris* the investigating officer had stated in a report that the rape victim had been unsure whether the defendant was her assailant when the police first asked her to identify him. The prosecution knew of this report but failed to furnish a copy of it to the defense. The victim subsequently testified at trial that when she first confronted Norris, she was certain that he was her assailant. We concluded that the report "was evidence which had a direct bearing upon the critical issue in the case and might 'reasonably have weakened or overcome testimony adverse to the defendant.'" *Id.* at 1244, quoting Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842, 847 (4[th] Cir. 1964). The report would have weakened the victim's credibility, as well as the accuracy of her identification of the defendant as her assailant. In an addendum to our opinion in *Norris* we further stated that since the omitted evidence "was of such a nature as to raise a substantial likelihood that it would have affected the result in Norris' trial," *Agurs* decided after *Norris* had been argued, but before its publication, did not require a different result.

In the case at bar the critical issue was the identity of the assailant. Robert McDowell is unmistakably black, and Patsy Mason first claimed that her assailant was white. Originally she claimed that he had shoulder length hair, later that he had an afro, and ultimately that his hair was flat. The state attempts to distinguish *Norris* from this case by stress-

ing that Patsy has always identified McDowell as her attacker when shown pictures of him. This contention unjustifiably diminishes the value of the prior inconsistent description in impeaching Patsy's credibility, or memory or both, and ignores the fact that, "[i]mpeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule." *Bagley*, 473 U.S. at 676. Whether Patsy testified truthfully and accurately determined the guilt or innocence of Robert McDowell. Hers was the sole identification testimony and where it was not, as here, incontestably corroborated by circumstantial evidence, the conclusion is inescapable that had the jury known of her prior inconsistent identifications, there was a reasonable probability that the outcome of McDowell's trial might have been different. Certainly it was enough to create a reasonable doubt of McDowell's guilt that did not otherwise exist.

The prosecution also argues that Patsy's first account is not material because Officer Baker described her as "semi-conscious" when she uttered the fact that her assailant had been white, although several physicians testified that she had been alert and conscious at the time. We recognize that had Patsy's prior inconsistent identifications been proved, there was evidence to minimize or explain away their damaging effect on the prosecution's case. But that evidence is not so overwhelming that we can say that the jury inevitably would have been persuaded that her in-court identification was entirely truthful and conclusive, and that her memory and credibility were beyond reproach. Thus we are not persuaded that the inconsistent prior identifications were not material as defined in *Bagley* and *Agurs*.

Another significant aspect of Patsy's account of her assailant's features concerns her prior acquaintance with McDowell. We do not doubt that the strategy counsel used to defend McDowell was influenced by their lack of knowledge of Patsy's first identifications of her attacker, and that the trial might have taken a different course "had the defense not been misled by the prosecutor's incomplete response." *Bagley* at 683. At trial, Patsy testified that she had seen McDowell once before the night of the attack, but only

briefly. In fact, defense counsel had evidence that Patsy had frequented "Black" nightspots around Sanford, and the owner of such a nightspot told police that the two knew each other, as did a friend of Terry Hinson's.* Although the defense counsel thus knew of this discrepancy in her testimony, we surmise that they chose not to prove it, because prior acquaintance between victim and defendant would have tended to support Patsy's ability to identify her assailant accurately. In light of Patsy's first description of her assailant as a white man, however, of which defense counsel was ignorant, Patsy's prior association with McDowell makes her subsequent identification of him as the attacker even less credible, and the likelihood of a different result in a new trial even greater.

While we think that suppression of the evidence of inconsistent identification alone is sufficient to vitiate McDowell's conviction, that conclusion is reinforced by consideration of other exculpatory evidence that was suppressed.

Jerry Stone's account of the events which occurred at the Mason home on July 14 is evidence which the jury was entitled to hear. His account calls Patsy's version of the night into question in two different respects. First, Patsy gave no account of Jerry Stone's visit in her own testimony which tracked her recollection of that evening from 6:00 p.m. until she lost consciousness from her wounds. Moreover, Jerry Stone's description of the man who visited the Mason home differs from Patsy's initial identification in several significant respects. Stone reported that the man wore no shirt and light green cutoff shorts, and Patsy testified that her assailant wore a dark pullover and jeans. If a jury found Jerry Stone credible, the fact that John Mason may have admitted a black male into his house when he

* The owner of the establishment also testified at the post-conviction hearing that John Mason told him to lie about the amount of time Patsy spent at his place if he was asked.

claims to have been asleep might seriously undermine his credibility as a witness as well.

Finally, evidence of a white intruder in the Mason home hours before the attack demonstrates that there might have been another person who had motive or opportunity to commit the crime. Although Hope and Sheila Spivey subsequently testified at the post-conviction hearing that they had imagined the intruders, it is undisputed that they stood by their story at the time they were initially questioned about it by the police. It is the province of the jury to determine whether it believed the story, and if so, whether the incident had any bearing on the subsequent crime.

We summarize by stating there is not insubstantial evidence that Robert McDowell murdered Carol Hinson and assaulted Patsy Mason. However, the only direct evidence presented by the prosecution is the eyewitness identification made by Patsy Mason. There is no evidence of matching fingerprints, bloodstains, body secretions, hair or fibers. The omitted evidence was not cumulative, and it was unquestionably contradictory of the prosecution's case against McDowell. In our view, the omitted evidence could have created a reasonable doubt in the minds of the jurors. We cannot say that even if the jury had been aware of the undisclosed evidence, it still would have had no reasonable doubt of McDowell's guilt of the crimes committed against Patsy and Carol Ann. It follows that McDowell was denied due process of law in his trial by the nondisclosure of the evidence that we have described.

We reverse the judgment of the district court and instruct it to issue the writ of habeas corpus, unless McDowell

is tried anew within such reasonable period as the district court may fix.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT HENRY McDOWELL *

Petitioner - Appellant

*

versus

* No. 87-4006

GARY W. DIXON, Warden, Central Prison, Raleigh, North Carolina *

Respondent - Appellee*

ORDER

The petition for rehearing with a suggestion for rehearing in banc has been read and considered.

A poll on the suggestion for rehearing in banc was requested. Judges Russell, Widener, Chapman, Wilkinson, and Wilkins voted to grant rehearing in banc, and Judges Winter, Hall, Phillips, Murnaghan, Sprouse, and Ervin voted to deny rehearing in banc. Rehearing in banc is thus denied, and it is so ORDERED.

The panel has unanimously voted to deny rehearing. Rehearing is thus denied, and it is so ORDERED.

It appears, however, that there were factual errors in the opinion filed June 20, 1988. It is therefore ordered that that opinion be and it is hereby withdrawn and that the opinion attached hereto be filed in its place and stead.

Entered this 27th day of September 1988, with the concurrence of Judge Ervin and Judge Butzner.*

/s/ Harrison L. Winter

Chief Judge

* This Order was filed in the Fourth Circuit on October 3, 1988.